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MASHRIZAM MAHAYADIN

v.

HOY KAM LAI & ANOR

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HIGH COURT MALAYA, ALOR STAR
SOFIAN ABD RAZAK J
[CIVIL APPEAL NO: 12-141-2004]
30 OCTOBER 2008

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ROAD TRAFFIC: *Negligence - Collision between motorcar and motorcycle - Appeal against liability - Whether car driver's right of way taken into consideration by sessions judge - Whether motorcyclist's traffic summons had bearing on liability*

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ROAD TRAFFIC: *Pillion riding - Collision between motorcycle and motorcar - Apportionment of damages to pillion rider - Case authorities - Murugasan Kuppusamy & Anor v. Chiew Eng Chai - Muhamad Jafri Jantan & Ors v. Zainal Md Rais*

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The respondents as plaintiffs brought an action for damages against the appellant as defendant in the Sessions Court that stemmed from a road accident involving the said parties. The accident was found to have happened at about 8.30pm at night at a T-junction along a main road which was a dual carriage way. There were no traffic lights to control the flow of traffic at the junction. The 1st respondent was the rider of a motorcycle whilst the 2nd respondent was the pillion rider. The 1st

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respondent coming from the direction of a place called Wang Tepus from the north claimed that he had made a right turn at the junction into a minor road called Jalan IPDA when the appellant had collided into him. The appellant was driving a motorcar coming from the direction of a place called Tanah Merah from the south. The 1st respondent claimed

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that he was already in Jalan IPDA when the collision happened. During cross-examination, he admitted that he would not have made the right turn if he had seen the appellant's motorcar coming. Also, he admitted that the appellant had the right of way. Against this, the appellant claimed that the collision happened at the junction and not at Jalan IPDA

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as claimed by the 1st respondent. Also, the 1st respondent was attempting to cut across to the right into Jalan IPDA. The sessions judge found, *inter alia*, that: (1) the 1st respondent did stop before proceeding into Jalan IPDA; (2) the appellant was travelling fast at a speed of 80-100 km per hour; (3) the collision occurred when the 1st

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respondent's motorcycle was already in Jalan IPDA; (4) the damage to the 1st respondent's motorcycle was on the rear left whilst the damage to the appellant's motorcar was on the front left; (5) the appellant used his dim lights instead of the high lights: and (6) the appellant's

admission that he did not see the 1st respondent's motorcycle was sufficient to prove negligence on his part. The sessions judge held the appellant 80% and 100% liable as against the 1st and 2nd respondents respectively. The appellant's counterclaim was allowed with costs. Hence, the appellant's appeal.

Held:

(1) The learned judge did not make any comments on the fact that the appellant had the right of way and that the 1st respondent had been issued with a traffic summons which had a bearing on the issue of liability. The finding by the sessions judge that the collision must have happened when the 1st respondent had already passed the T-junction and was on Jalan IPDA was highly improbable. If the 1st respondent was already on Jalan IPDA, the collision would not have happened. Nevertheless, despite the appellant having the right of way when travelling on the dual carriage road, liability should be apportioned equally between the 1st respondent and the appellant on a 50% : 50% basis. The reason being that the 1st respondent should have been more careful in ensuring that there were no vehicles coming from Tanah Merah towards Wang Tepus before turning into Jalan IPDA. Likewise the appellant should have been on the lookout for any vehicle which might make a sudden turn into Jalan IPDA as what had happened. In the circumstances, both parties were equally to be blamed for the collision. (paras 9, 10 & 11)

(2) The amount of quantum awarded by the learned judge was just and reasonable and should not be disturbed. Costs to be borne by each party. (para 12)

(3) As liability between the appellant and 1st respondent was apportioned on a 50% : 50% basis and no appeal was filed against the decision of the sessions judge allowing the appellant's counterclaim with costs, the appellant was liable to pay 50% of the total quantum of damages to the 2nd respondent and the other 50% to be paid by the 1st respondent to the 2nd respondent. (para 30)

Case(s) referred to:
Muhamad Jafri Jantan & Ors v. Zainal Md Rais [2005] 1 CLJ 694 CA ***(dist)***
Murugasan Kuppusamy & Anor v. Chiew Eng Chai [2000] 1 CLJ 42 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 10(1)(c)

For the appellant - T Thurairaj; M/s Thurairaj T Kumar & Assoc
For the respondent - Aidi Abdullah; M/s NM Tiong & Co

Reported by Usha Thiagarajah

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JUDGMENT

Sofian Abd Razak J:

[1] This is an appeal by the appellant/defendant *vide* Notice of Appeal dated 9 October 2004 to the High Court against the decision of the
B learned Sessions Court judge dated 4 October 2004 against liability and quantum. In so far as the decision on liability, the learned Sessions Court judge found that the appellant/defendant was 80% liable and the first plaintiff/respondent was 20% liable and the appellant/defendant is 100% liable to the second plaintiff as pillion rider and the appellant/
C defendant's counterclaim against the respondent/plaintiff is allowed with costs.

[2] On 4 September 2007 after reading the appeal record, written and hearing oral submissions by both counsels for the appellant/defendant and
D respondent/plaintiff, the court allowed the appeal on the issue of liability in that the liability be apportioned equally on a basis of 50% : 50% as between the appellant/defendant and first respondent/plaintiff respectively. The court further ordered that the award of quantum of damages as awarded by the Sessions Court be maintained and each party to pay their own costs. It was also ordered that upon further clarification made
E on 5 March 2008 on the issue of liability, that the appellant/defendant be held 50% to blame and the first respondent/first plaintiff to be held to blame and according to the counterclaim against the first respondent/ first plaintiff that was allowed by the Order of the Sessions Court. It was further ordered that the appellant/defendant do pay to the second
F respondent/second plaintiff 50% of the total quantum of damages. Lastly, on that basis, the respondents' solicitors M/s. N.M. Tiong & Co. do return and pay to the appellant/defendant the sum of RM528,605.70 held by them within 30 days from the date of Order made on 5 March 2008.

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[3] The respondent/plaintiff who was dissatisfied with the said decision has since filed an appeal.

[4] Facts of this case when analyzed are as follows:

H **[5]** The place of the accident was at a T junction which according to the sketch plan marked as exh. P6 and key marked as P6K shows a dual carriageway from Tanah Merah to Wang Tepus in the north and Wang Tepus to Tanah Merah in the south and from Wang Tepus, Tanah Merah to IPDA (Institut Perguruan Darulaman) on the left. Both
I the dual carriage way is the main road and has a right of way whereas the road towards IPDA is a minor road. Any vehicle coming from the direction of Wang Tepus into IPDA has to take the lane on the extreme

right, stop and ensure that there are no vehicles travelling from the direction of Tanah Merah to Wang Tepus. From the sketch plan P6, there is no traffic light to control the flow of traffic especially for traffic coming from Wang Tepus to IPDA except for a white line drawn at the edge of the road on the direction of Tanah Merah to Wang Tepus and Jalan IPDA. The accident happened at about 8.30pm at night.

[6] According to first plaintiff's evidence at the material time he was the rider of motorcycle No: ADT 3009 with the second plaintiff as the pillion rider. The first plaintiff came from the direction of Wang Tepus heading towards IPDA which is on the right side of the dual carriage way. Before turning into IPDA, the first plaintiff had to take the lane on the extreme right and had to stop to ensure no traffic is coming from Tanah Merah towards Wang Tepus. The first plaintiff said after he had made a turn to the right into IPDA that he saw a motorcar driven by the defendant travelling at an estimated speed of between 80-100 km per hour. The plaintiff stated that he was already in Jalan IPDA when the collision happened. The first plaintiff also stated that he did not take any evasive action to avoid the collision just minutes before the impact. During cross-examination, the first plaintiff further stated that if he had seen the defendant's motorcar coming, he would not have made the right turn into IPDA. The first plaintiff admitted that the vehicle travelling from Tanah Merah to Wang Tepus has the right of way.

[7] The defendant who was the driver of motorcar registration No: KAP 1230 was at the material travelling towards Wang Tepus in the north from the direction of Tanah Merah in the south, if one looks at the sketch plan P6. The defendant further stated that the said collision happened at the 'T' junction and not at Jalan IPDA as claimed by the first plaintiff. The defendant stated that the collision happened at the edge of the junction as the first plaintiff's motorcycle was attempting to cut across to the right from the right lane of Jalan Wang Tepus into Jalan IPDA. At the material time, the defendant did not use the high light but instead used the dim light.

[8] Perusing the grounds of decision on the issue of liability the learned Sessions Court judge made the following observation namely:

i) that the first plaintiff had stopped on the lane at the extreme right as one faces the direction of Tanah Merah from Wang Tepus before proceeding towards Jalan IPDA;

ii) that the defendant's motorcar according to the first plaintiff was driven at quite a speed of 80-100 km per hour;

iii) that the collision occurred when the first plaintiff's motorcycle was already at Jalan IPDA;

iv) that the damage on the first plaintiff's motorcycle was found on the left rear and the defendant's motorcar on the front left;

v) that the defendant had used its dim head lights when travelling along the said road instead of the high light;

vi) that the learned Sessions Court judge made a finding of fact that the collision happened either at the second lane or the edge of the third lane;

vii) that the defendant's admission that he did not see the plaintiff's motorcycle was sufficient to prove negligence on his part. The reason was because the defendant had switched to dim light on the headlight;

viii) that the defendant had to be extra careful when approaching a junction and ought to have used the high light in order to have a clear vision;

[9] After evaluation of the evidence as presented by the witnesses in particular the first plaintiff and the defendant and reading the grounds of decision by the learned Sessions Court judge, I made the following observation namely:

i) that the road from Tanah Merah to Wang Tepus and Wang Tepus to Tanah Merah respectively is a dual carriage road. Each side has two lanes;

ii) that being a dual carriage road, the vehicle travelling from Tanah Merah towards Wang Tepus has the right of way;

iii) That the defendant has the right of way when travelling from Tanah Merah towards Wang Tepus subject to precaution taken when approaching the 'T' junction;

iv) That the first plaintiff in attempting to enter into Jalan IPDA had to stop and ensure that no other vehicle is coming from Tanah Merah towards Wang Tepus;

v) that Jalan IPDA is a minor road;

vi) that the first plaintiff had been issued with a summons as a result of the accident.

[10] The learned Sessions Court judge in his grounds of decision did not make any comments on the fact that the defendant had the right of way, that the first plaintiff had been issued with a traffic summons which has a bearing on the issue of liability. That the finding by the learned Sessions Court judge that the collision must have happened when the first plaintiff had already passed the junction and was on Jalan IPDA is highly improbable. If the first plaintiff had already been on Jalan IPDA, the collision could not have happened.

[11] Be that as it may, the court is of the considered view that despite stating that the defendant had the right of way when travelling on the said dual carriage road, the liability should be apportioned equally between the first plaintiff and the defendant 50% : 50% respectively. The reason being that the first plaintiff when turning into Jalan IPDA should have been more careful in ensuring that there was no vehicle coming from the direction of Tanah Merah towards Wang Tepus. Likewise the defendant should also be on the lookout for any vehicle which might make a sudden turn into Jalan IPDA as what happened. In the circumstances, I find that both are equally to be blamed for the said collision. The court hereby so ordered accordingly.

[12] In so far as the issue of quantum is concerned, the court was of the view that the amount of quantum awarded by the learned Sessions Court judge was just and reasonable in the circumstances of the case and I shall not disturb them and costs to be borne by each party. The above decision was delivered on 4 September 2007.

[13] On 17 December 2007 before the court, Mr. T. Thurairaj, learned counsel for the appellant appeared to have an appointment to settle the judgment given on 4 September 2007.

[14] Mr. T. Thurairaj proceeded to inform the court that the appellant need only pay 50% of the quantum amount in view of the fact that the appellant's counterclaim had also been allowed by the Sessions Court and no appeal was filed against the said decision.

[15] Be that as it may and in view of the fact that En. Aidi Abdullah, counsel for the respondent was not present, the court fixed 6 January 2008 for En. Aidi Abdullah to submit on the issue raised by the learned counsel for the appellant.

[16] On 6 January 2008, the learned counsel for the appellant/defendant was not present and had faxed a letter to court as to why he could not be present. Nevertheless, the learned counsel for the respondent/plaintiff En. Aidi Abdullah together with En. Azam were

present and the court fixed 5 March 2008 for the learned counsel for the respondent/plaintiff to submit upon receipt on the written submission from the appellant/defendant.

[17] On 5 March 2008, both learned counsels for the appellant/defendant Mr. Thurairaj and for the respondent/plaintiff Cik Haris appeared, the court heard oral submissions from learned counsel for the appellant/defendant Mr. T. Thurairaj and En. Aidi Abdullah of counsel for the respondent/plaintiff.

[18] In his submission, the learned counsel for the appellant/defendant further submitted that in the case before court since the liability had been apportioned 50% : 50% as between the appellant/defendant and the respondent/plaintiff and the appellant/defendant's counterclaim at the Sessions Court was allowed and no appeal filed. It follows that the appellant/defendant is to pay 50% of the total amount of damages to the second respondent/second plaintiff and the first respondent/first plaintiff to pay the other 50% of the damages from the total amount of damages by way of indemnity and set off to the respondent/second plaintiff. The learned counsel for the appellant/defendant further submitted that the firm of Messrs. N.M. Tiong & Co. be ordered to refund and pay to Messrs. Thurairaj T. Kumar & Associates, solicitors for the appellant/defendant the sum of RM528,605.70 held as stakeholder within thirty (30) days from the date of the Order ie, on 5 March 2008 and on or before 5 April 2008.

[19] The learned counsel for the appellant/defendant relied on the case of *Murugasan Kuppusamy & Another v. Chiew Eng Chai* [2000] 1 CLJ 42 HC.

[20] The facts of the said case is that the plaintiffs, a husband and a wife and the defendant were involved in a road accident on 5 April 1992. The husband was the rider of the motorcycle and the wife was the pillion rider. Two suits were filed in the Sessions Court. In the first suit, the husband alleged negligence on the part of the defendant as the driver of the motorcar. The defendant counterclaimed and pleaded a set-off against the husband by pleading contributory negligence and also for a contribution by the judgment for any judgment sum that the defendant may be ordered to pay to the wife in the second suit. In the second suit, the wife also alleged negligence on the part of the defendant. The defendant also counterclaimed and pleaded a set-off similar to that in the first suit. In the first suit, the Sessions Court found that the defendant was 80% liable and the husband 20% liable. In the second suit, the defendant was found 100% liable. However, in making the award, the court reduced the amount of damages to be paid by the defendant to the wife by 20% which was equivalent to the husband's liability for

contributory negligence. The plaintiff appealed. It was argued that the Sessions Court was wrong in deducting 20% off the damages awarded to the wife. It was argued that prior to 8 July 1994 ie, prior to the amendment of the Married Women Act, 1957, a husband and wife could not sue each other in tort. The accident happened before the amendment. As the wife could not have sued the husband when the cause of action arose, ie, on the date of the accident, the husband should not be made to bear the 20% liability attributed to him.

[21] Abdul Hamid Mohamad J (as he then was) in dismissing the appeal held *inter alia*:

(i) If because of the wording of s. 10(1)(c) of the Civil Law Act 1956 and the common law rule the wife could not sue the husband and the defendant too could not sue (counterclaim against) the husband then the plaintiff had no remedy against the husband. It means that the defendant would not be able to recover the 20% damages which he was made to pay to the wife. So the argument that he should pay the full damages first and recover the 20% later from the husband was not a valid argument.

(ii) Further, as a matter of policy, there was no reason why the defendant should be made to pay more to the wife of the other tort-feasor, why she should recover more from him than what she was entitled to, why the defendant should be made to file action against the husband to recover the difference incurring more costs and time while clogging the court docket. Indeed, there was no necessity for the defendant to file a fresh suit against the husband. The defendant had already counterclaimed against the husband in the first suit. In the second suit, he had prayed for a set-off from whatever judgment he might get in the first suit. Both cases were heard together. The Sessions Court had found the husband contributory negligent. Another suit would be *res judicata*. The counterclaim was already a suit and had already been decided upon a full trial. For these reasons, the Order of the Sessions Court in reducing the damages awarded to the wife was correct, just and expedient.

[22] The learned counsel for the respondent/plaintiff referred to the case of *Muhamad Jafri Jantan & Ors v. Zainal Md. Rais* [2005] 1 CLJ 694 where:

1) At the Court of Appeal, the principle issue that fell for determination was whether the second plaintiff being a pillion rider of the motorcycle was entitled to damages on a 100% basis notwithstanding the fact that the rider of the motorcycle (first plaintiff) had been found to have contributed 50% to the accident.

2) The Court of Appeal held that the second plaintiff was an 'innocent passenger' and was therefore entitled to damages on a 100% basis. He could not as a pillion rider be held to be vicariously liable for the contributory negligence of the first plaintiff. The learned judicial commissioner had thus erred in apportioning liability on a 50 : 50 basis as between the second plaintiff and the defendant.

[23] It is pertinent to note that in *Muhamad Jafri Jantan*'s *(supra)* the Sessions Court had dismissed the defendant's counterclaim and no appeal was filed by the defendant against the said dismissal. On the facts of *Muhamad Jafri Jantan*'s case, I am of the view that the Court of Appeal was correct in holding that the second plaintiff was an 'innocent passenger' and was therefore entitled to damages on a 100% basis. The second plaintiff as a pillion rider could not be held to be vicariously liable for the contributory negligence of the first plaintiff (the rider).

[24] On 29 April 2008 this court granted an order for stay of proceeding/execution applied for by the respondent/plaintiff pending appeal to the Court of Appeal after the *inter parte* hearing. What is relevant for the court to state is that, in the course of hearing for stay, learned counsel appearing for solicitors for the respondent/plaintiff, Mr. P.R. Manecksha submitted to court a copy of Notice of Appeal No: P-04-29-1999, a copy of Memorandum of Appeal and a copy of the Order in respect of *Murugasan Kuppusamy v. Chiew Eng Chai*.

[25] The learned counsel submitted that the Court of Appeal in *Murugasan a/l Kuppusamy (supra)* had allowed the appeal by the appellant/ Murugasan a/l Kuppusamy against the finding that he (Murugasan) was 20% liable for contributory negligence in the first suit and the Court of Appeal had also reversed the finding by the Sessions Court and affirmed by the High Court with regard to counterclaim and set-off in both the first and second suits.

[26] The appeal to the Court of Appeal by the appellant in the *Murugasan*'s case was against the decision of the learned High Court judge confirming the decision of the Sessions Court in allowing the defendant's counterclaim. The other issue which was for the Court of Appeal's determination was whether prior to the amendment to the Married Women Act 1957 a husband or wife could sue each other in tort.

[27] The relevant amendment to the Married Women Act 1957 reads as follows:

> A husband or wife shall be entitled to sue each other in tort for damages in respect of injuries to his or her person, as the case may be, in the manner as any other two separate individuals.

[28] The amendment inserted by Act A893 came into force on 8 July 1994. A

The Finding Of The Court

[29] From the evidence given by both the first and second respondents/first plaintiff and second plaintiff they were not married at the material time of the accident nor were they married at the material time the suit was filed at the Sessions Court. In this regard, the provision of Married Women Act 1957 in particular the amendment made by Act A893 which came into force on 8 July 1994 is not applicable to the case before the court. B C

[30] To my mind the relevant principle of law which can be applied in so far as the cases cited by both counsels for the appellant/defendant and respondent/plaintiff is that where the court has allowed the counterclaim of the defendant against the first plaintiff (rider of the motorcycle) and no appeal is filed, the liability is apportioned as between the defendant and the first plaintiff accordingly. Likewise in the case before the court, when the court makes a finding that liability as between the appellant/defendant and first respondent/plaintiff is apportioned on a basis of 50% : 50% and appellant/defendant's counterclaim allowed by the Sessions Court and no appeal filed, the appellant/defendant is liable to pay 50% of the total quantum of damages to the second respondent/ plaintiff and the other 50% of the quantum of damages to be paid by the first respondent/plaintiff to the second respondent/plaintiff. D E

[31] The case of *Muhamad Jafri Jantan (supra)* on the facts is distinguishable from the instant case because there was no appeal by the defendant against the decision of the Sessions Court dismissing the counterclaim. That being the case, the decision of the said case was purely on the fact that the defendant was 100% liable to the pillion rider. F G

[32] Based on the reasons as adumbrated above, the court ordered that liability is apportioned on equal basis of 50% : 50% as between the appellant/defendant and first respondent/plaintiff. That quantum of damages as awarded by the Sessions Court is affirmed, and each party to pay their own costs. It was further ordered that the appellant/ defendant do pay to the second respondent/plaintiff 50% of the total quantum of damages and the other 50% of the quantum of damages to be paid to the second respondent/plaintiff by the first respondent/ plaintiff. Lastly, on that basis, the respondents' solicitors Messrs. N.M. Tiong & Co. do return and pay to the appellant/defendant the sum of RM528,605.70 held by them within 30 days from the date of Order made on 5 March 2008. H I